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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PHILLIP A. BISHOP,
Petitioner,
v.
O.H. DELCHAMPS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment allows a professor to express personal religious beliefs to students at a public university during class time.

2. Whether a public university, which has authority to regulate the academic speech of its faculty, can prohibit the expression of religious beliefs in order to protect students' rights and avoid an Establishment Clause violation.

PARTIES TO THE PROCEEDING

In addition to the party listed in the caption, the following persons are also parties: Hon. Guy Hunt, Dr. Wayne Teague, Mr. Yetta G. Samford, Jr., Mr. Frank H. Bromberg, Jr., Mr. Garry Neil Drummond, Mr. Jack Edwards, Mr. T. Michael Goodrich, Dr. Sandral Hullet, Mr. James D. Loftin, Sr., Mr. John T. Oliver, Jr., Mr. George S. Shirley, Mrs. Martha H. Simms, Mr. Cleophus Thomas, Jr., and Dr. Cordell Wynn. Aaron M. Aronov, Winton M. Blount, William H. Mitchell, and Thomas E. Rast, who were Defendants-Appellants in the court below, are no longer members of the Board of Trustees, and therefore are not parties in this Court. *See* SUP. CT. R. 35.3.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Dr. Phillip Bishop [hereinafter "Bishop"] initiated this litigation to challenge the constitutionality of certain instructions given to him by administrators at the University of Alabama [hereinafter the "University"]. He had been told to discontinue interjecting personal religious beliefs into class lectures and to refrain from holding an extra class meeting to discuss his religious beliefs. Bishop believes that these prohibited actions are protected by the First Amendment, and that consequently, the University may not compel him to cease these activities.

The University maintains that Bishop has no constitutionally protected right to engage in these activities, that pursuant to its general responsibility to manage the institution it has the right to limit the topics that may

be discussed in university classes, and that it has an affirmative obligation to prevent conduct that violates the Establishment Clause of the First Amendment. The University also contends that the instructions given to Bishop are not so broad or vague that he cannot understand what activities are prohibited.

A. The Facts

Bishop is a member of the faculty at the University of Alabama, teaching in the Area of Health, Physical Education and Recreation within the College of Education. His specialty is exercise physiology. Dep. of Phillip A. Bishop (3/14/89) [hereinafter "Bishop Dep."] at 6-13.

Prior to the Fall Semester of 1987, Bishop had spoken about his personal religious beliefs to his students during instructional time. Complaint paras. 7-10 (R1-1-7 to 10). The classroom comments arose in two ways. First, in response to student questions about careers in higher education, Bishop explained that his Christian beliefs helped him to handle the pressures placed on untenured faculty members. Aff. of Phillip A. Bishop (7/11/89) [hereinafter "Bishop Aff."] at 2-3 (R2-40).

Second, in explaining the operation of the human body to his students, Bishop made references to God as creator. For example, after describing the intracacies of the operation of the oxygen delivery system to the muscles of the body and explaining how this delivery system changes as the body engages in exercise, he would make a comment such as, "so you can see God designed a very, very clever and efficient 0^2 [sic] transport system." *Id.* at 4.[1]

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[1] The district court completely ignored this second kind of statement and chose instead to find only that Bishop's in-class comments were prefaced as personal bias. Bishop engaged in this kind of "spontaneous" comment on a regular basis. *See*, Petition for Writ of Certiorari, *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (No. 91-286) [hereinafter "Pet."] at 3, 4. The Eleventh Circuit did not address the University's contention that the failure of the district court to recognize this kind of comment was a clearly erroneous finding of fact.

Bishop admits that "he is presenting only his views" when he is expressing his religious beliefs to his students, and he frankly admits that when he explains his understanding of the creative force behind human physiology, he is not offering his comments "in the context of presenting multiple opinions" and that his comments "are suggestive to his students that his views are correct. . . ." Pl.'s Admis. Nos. 1-2 (R1-28).

In March or April of 1987, Bishop conducted an extra class meeting in which he discussed the topic "Evidence of God in Human Physiology." Pl.'s Answers to Def. First Interrogs. [hereinafter "Int. Ans."] No. 11 (R1-29-No. 11). This class was characterized as "optional," but it contained technical material (which he described as "optional additional" and "enrichment" material) and was designed particularly for Bishop's graduate exercise physiology class. Bishop Dep. at 38-39. In identifying whom he invited to the extra class meeting, Bishop stated: "Essentially it was open to anyone who wanted to attend. I specifically asked people in the exercise physiology class because it's fairly technical material. People off the street wouldn't know what I was talking about. So it's an invitation to the exercise graduate class I was teaching." *Id.* at 39.

In his extra class, Bishop discussed various aspects of the human body, including the complexity of its design and operation. He offered this information as evidence that man was created by God and that evolution alone could not account for the phenomenon of man. Int. Ans. No. 12 (R1-29-No. 12). Included in his presentation were slides, two of which contained the statement "God's design is far superior to man's design," and a third, which stated "For God didst form my inward parts; God didst weave me in my mother's womb. I will give thanks to God for I am fearfully and wonderfully made. Psalm 139:13-14." Bishop Dep. at 36-38.

Near the end of the Spring 1987 semester, Dr. Carl Westerfield, Area Head (equivalent to Department Chairperson), received student complaints about Bishop's inter-

jection of his personal religious beliefs into class lectures and his holding of the extra class specifically to discuss religious matters. Significant to Westerfield was the fact that this extra class meeting was held before Bishop gave his final exam and assigned grades in the class. Dep. of Carl Westerfield (1/15/89) [hereinafter "Westerfield Dep."] at 15-16, 36-37.

Later that summer, when the department's faculty discussed recruitment of graduate students, Bishop suggested that the department could successfully recruit graduate students by advertising that the University offered a "Christian perspective" on the subject matter. Aff. of Carl Westerfield (8/14/89) (R2-45-2).

Due to the students' complaints and Bishop's recruitment suggestion, Dr. Westerfield consulted with appropriate University officials, and on September 16, 1987, issued a memorandum to Bishop containing the following instructions:

> Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as The University of Alabama and should cease. Among those actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment, admission or retention of graduate students.

Pl.'s Ex. 4 to Westerfield Dep.

Contrary to the assertion of the petition, Westerfield's instruction to cease these activities was not motivated by embarrassment, but by a concern that Bishop's activities

were "unwarranted at a public institution," which is obligated to protect students' rights under the Establishment Clause.[2]

The University of Alabama has no specific policy that dictates how professors should conduct their classes, and it makes no attempt to require faculty members to limit every class comment to the subject matter only. The Board of Trustees of the University, however, has constitutional and statutory authority to manage the affairs of the University. *See* ALA. CONST. art. XIV, § 264, and ALA. CODE §§ 16-47-1 to -2 (1987). The University has endorsed the principles in the statement of professional ethics adopted by the American Association of University Professors. Pl.'s Ex. No. 8 to Westerfield Dep. (R2-45). That statement says, in part, that a faculty member "demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor." *Id.* at 123. In accordance with this statement, the University operates on the premise that its faculty members will conduct themselves according to highest principles of ethical standards and will refrain from using their positions as faculty members to advance their personal views, whether political, social, or religious.

B. Proceedings Below

On cross motions for summary judgment, the district court granted summary judgment for Bishop and enjoined the University from both restricting his classroom speech and prohibiting the optional class meetings, provided he used a blind grading system. *See Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990). The district court relied on *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), to reach its conclusion that Bishop had the right to express his personal

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[2] Petitioner's lawyers asked Westerfield, "Do you regard it as an embarrassment to the University that Dr. Bishop has views about religion that he thinks can be appropriately discussed in an academic context?" Dr. Westerfield's response was "No." Westerfield Dep. at 42.

views in the classroom as long as they were not disruptive. *Bishop*, 732 F. Supp. at 1565-66. The district court then misapplied the reasoning of *Widmar v. Vincent*, 454 U.S. 263 (1981), by determining that university classes are open forums and that the University violated Bishop's First Amendment rights by prohibiting his expression of religious beliefs in such a forum. The court also found that the written instructions given to Bishop were vague and overly broad. *Bishop*, 732 F. Supp. at 1565-66.

The Court of Appeals for the Eleventh Circuit reversed and ordered summary judgment for the University. *See Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). That court essentially adopted the facts as determined by the district court,[3] but rejected the district court's application of *Widmar* by holding that "Dr. Bishop's classroom is not an open forum." *Bishop*, 926 F.2d at 1071. It also concluded that because the University's instructions proscribed specific conduct and adequately informed Bishop of the conduct it was addressing, they were not vague or overbroad. *Id.*

To determine the sufficiency of the University's interests in restricting Bishop's expression in the classroom, the court applied a balancing of interests test fashioned after this Court's analysis in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). While admitting that *Kuhlmeier* dealt with a secondary school, the court nonetheless determined that "insofar as [*Kuhlmeier*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level." *Bishop*, 926 F.2d at 1074. The key point in the balancing was the fact that Bishop expressed his religious comments in the classroom setting.

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[3] The Eleventh Circuit's handling of the facts is not precisely clear. It stated: "[W]e largely adopt the district court's statement of the facts, quoting freely therefrom and supplementing it as necessary." *Bishop*, 926 F.2d at 1068. The court did not address the University's contentions regarding clearly erroneous findings of fact by the district court.

> First and foremost, we consider the context: the university classroom during specific in-class time and the visage of the classroom as part of a university course in an after-class meeting. This context also leads us to consider the coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid. The University's interest is most obvious when student complaints suggest apparent coercion—even when not intended by the professor.

Id.

Noting that "[f]ederal judges should not be ersatz deans or educators," and that the court "cannot supplant our discretion for that of the University," *id.* at 1075, the Eleventh Circuit determined that Bishop's expressions, including the so-called optional class meeting, were made in the context of classroom responsibilities and that the University's instructions were narrowly tailored and constituted a proper exercise of the University's right to control its curriculum. *Id.* at 1075-77. "In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute." *Id.* at 1076.

The court also determined that the University's instructions violated neither Petitioner's free exercise rights nor the Establishment Clause. The court did not reach the question of whether Bishop's expressions, themselves, violated the Establishment Clause, though it did suggest that his extra-class meeting was "particularly suspect." *Id.* at 1077-78.

REASONS FOR DENIAL OF THE WRIT

In an attempt to paint Respondents as an entity identified with denial of constitutionally protected rights, the lawyers for Bishop begin their petition by speculating that University officials, 30 years ago, would have sought to suppress statements advocating racial equality, just as they now seek to suppress Bishop's religious comments.[4]

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[4] Indeed, had they researched the topic, petitioner's counsel would have found the facts to be much different than they seek to por-

This emotional and irrelevant fabrication is nothing but an obtrusive attempt to divert the Court's attention from the real issues in the case.

Reduced to its essence, Petitioner's ultimate request to this Court is for it to legitimate clearly religious expressions in his classes under the guise of academic freedom. Petitioner seeks to portray the University's actions as a direct threat to academic freedom, while ignoring the effect of Bishop's conduct and the truly limited nature of the instructions given to him. His zeal to effect a fundamental change in the current status of the law prohibiting religious statements in the classroom has caused him to misconstrue the nature of academic freedom in higher education and the parameters of appropriate professional conduct. An accurate analysis of the law demonstrates that the Eleventh Circuit's opinion is correct and consistent with decisions of other courts of appeal as well as those of this Court. Consequently, this Court should deny the Petition for Writ of Certiorari.

I. THIS CASE IS ABOUT THE UNIVERSITY'S AUTHORITY TO CONTROL ITS CURRICULUM AND TO PREVENT A PROFESSOR FROM VIOLATING THE ESTABLISHMENT CLAUSE: IT DOES NOT POSE ANY THREAT TO ACADEMIC FREEDOM.

In creating a favorable structure for the issues before this Court, Bishop now describes this case as a national threat to academic freedom. Strangely, no threat to academic freedom was argued in the district court or in the Eleventh Circuit.[5] In both courts below, Petitioner's focus was on applying *Widmar* in a way never intended by this Court. Bishop asks this Court to characterize all univer-

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tray. University officials, as opposed to other forces in the state at that time, eagerly cooperated with Justice Department officials to facilitate the admission of Blacks at the University of Alabama.

[5] It is true that count one of the complaint is labeled "Academic Freedom." However, this topic was not specifically argued in either court below. Petitioner's contention below has always been that he had general First Amendment protection for his expressions.

sity classes as open forums and to establish an absolute right for faculty members to speak therein about whatever they wish.

The facts show, however, that this is not an open forum case, it does not pose a national threat to academic freedom, and it does not present a purely academic dispute between employer and employee over how to present material that everyone agrees is properly included in the course. It is, instead, about one university professor's class-time expressions of religious views that are wholly unrelated to his assigned subject,[6] and that were presented in a manner that his students and his supervisors found coercive and objectionable. It is about the right of the University to exercise its management authority appropriately to prevent Establishment Clause violations affecting the rights of its students.

A. This Case Is About A Professor's Actions In Violation Of The Establishment Clause.

To deemphasize his Establishment Clause violation, Petitioner seeks to portray his religious expressions as minimal, making reference to the limited time consumed in class. He describes his extra class meeting as an extracurricular event not really associated with his classes. His characterizations, however, do not change the fact that both his in-class expressions and his optional class arose in the course of his assigned duties.

For a religious activity to avoid an Establishment Clause violation, the activity must meet all three criteria announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[7] "First, the [action] must have a secu-

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[6] The fact that those beliefs may be derived or inferred from the conclusions Bishop draws from his study of the assigned subject matter does not make the expression of religious belief material to a discussion of the operation of the body.

[7] A public employee's engaging in speech that directly conveys a peculiarly religious message during the performance of his assigned duties must, by definition, implicate the Establishment Clause.

lar legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-613.

1. *Bishop's In-Class Comments And His Extra Class Meeting Have No Secular Purpose.*

The plainly stated purpose of Bishop's activities is to share his religious beliefs with others. "I have a personal religious belief that I should share my views about Jesus with others when the appropriate circumstances arise." Bishop Aff. at 3 (R2-40). Bishop argues that his actions are justified as part of an open exchange of ideas in keeping with the purpose of a university and that his actions are consistent with and in furtherance of academic debate. However, the disputed activities did not occur in an atmosphere of a free exchange of ideas, but involved a statement of personal belief conveyed as unquestionable truth.

The first type of Bishop's in-class comments, and the one emphasized in his petition, describes his approach to life and/or his personal bias, in response to questions.[8] The second kind of comment refers to God as the designer of the human body's complexities. Even though seemingly benign, and even though those references to God occurred only one or twice a month, they were made for the unmistakable purpose, and had the effect of, conveying a message of religious truth—precisely the kind of activity the Establishment Clause prohibits. Petitioner has freely admitted that he believes that he must share his beliefs

[8] While a professor certainly has a right to, and should, answer questions during class, good judgment should be used to avoid taking advantage of the situation for one's own purposes. A more appropriate response would have been "Personally, my religious beliefs help me in times of stress. I don't believe we should discuss that in class, but I will be happy to talk with you about it privately." Such a response would have avoided an Establishment Clause problem and would have preserved the opportunity for Bishop to share his beliefs privately with any student who was interested.

with others and these comments were designed to do just that. *See* Bishop Aff. at 3.

The extra class meeting, which had no secular purpose, also violated the Establishment Clause. There can be no question that the content of this "class" was intended to convey, and had the effect of conveying, a distinctly religious message. Bishop implicated the authority of the public university by the manner in which he announced and held the optional class, which was connected to the course he was teaching for the University. The violation was in the fact that the religious messages were directly connected to the classes assigned to Bishop. As the Eleventh Circuit pointed out, he could properly have called a meeting to discuss any subject he wished, as long as it was not tied to the courses he teaches.[9] But in this case it was so tied.

2. *The Primary Effect Of Bishop's In-Class Comments And His Extra Class Meeting Is To Advance His Religious Philosophy.*

The plain and simple effect of Bishop's classroom comments and his extra class meeting is to communicate the content of his personal religious beliefs to his students and to suggest that his views are correct. There is no difference in the message communicated by Bishop and that communicated by prayers in public schools, which have uniformly been found to be in violation of the Establishment Clause. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38 (1985).

The manner in which he made his comments, the where and when, leaves an impression that his activities were backed by the authority of the state, a fact which necessarily leads to the conclusion that the University's con-

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[9] Petitioner argues that the court of appeals had to contort this aspect of the instructions given in order to validate them. Pet. at 15. In fact, the Eleventh Circuit plainly explained that the University's instructions left Bishop free to schedule a "meeting" to discuss this subject as long as it was not connected to the "classes" he was assigned to teach. *Bishop*, 926 F.2d at 1076.

donation of these activities would be a violation of the Establishment Clause.

3. *Bishop's In-Class Comments And Extra Class Meeting, If Allowed To Continue, Would Foster An Excessive Entanglement With Religion.*

To allow Bishop to continue his actions would result in "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. This third part of the test focuses on the relationship that would result between religion and the University if the activity continued. *Id.* at 615. The University would be forced, on an on-going basis, to monitor Bishop's comments, as well as those of all other faculty members who may choose to make comments about personal religious beliefs, to determine whether any unconstitutional statements were being made. Although the district court found no excessive entanglement in the existing situation, it did acknowledge: "Such monitoring would be an especially offensive violation. . . ." *Bishop*, 732 F. Supp. at 1568.

4. *The Real Issue In An Establishment Clause Inquiry Is The Extent Of State Involvement.*

The basic principle embodied in the religion clauses of the First Amendment is that the government must be *neutral* toward the religious beliefs of its citizens. As this Court has explained,

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968).

Therefore, each citizen is free to choose what to believe or what not to believe concerning religious matters.

The government, however, may not attempt to influence what a citizen should believe or what a citizen should not believe (an "establishment of religion"). In order to ensure that this does not happen, the government must be careful not to establish or condone any relationship with its citizens in which the government, by statute, policy or practice, exerts influence over a citizen's religious beliefs.

In the facts of this case, Bishop, an employee of the state, is in a position of influence over his students, so that his comments in class may well affect his students' beliefs about religion. Indeed, *that is exactly what he hopes will happen!* This same direction is clear in his desire to advertise a "Christian" perspective in student recruitment. This is precisely what the religion clauses of the First Amendment were designed to prohibit.[10]

Each of Bishop's activities, his in-class comments and his extra class meeting, violate all three parts of the *Lemon* test and constitute a violation of the Establishment Clause. If the University had not taken action to prevent further in-class comments and additional extra class meetings, students who were offended could have easily accused the University of violating their rights under the Establishment Clause.

Therefore, even though not addressed by the court of appeals, the Establishment Clause violation provides good reason not to disturb the decision of that court.

B. Petitioner's Emphasis On Viewpoint Discrimination Ignores Students' Rights Under The Establishment Clause Of The First Amendment.

The second portion of the petition asserts that Bishop's activities are merely an expression of a "viewpoint," and therefore they are no different from other expressions of

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[10] Even though Bishop insists that attendance at the extra class meeting is purely voluntary, his position as instructor and the timing of the meeting before final exams is presumptively coercive. Bishop acknowledged that the timing of his extra class had a subtle coercive effect on his students' attendance when he admitted in his deposition that "[n]ot too many people come to those classes after the final exam. . . ." Bishop Dep. at 40.

viewpoints by other professors, protected by the First Amendment. He argues: "That petitioner's intellectual perspective happens to be religious does not remove his speech from the protections of the First Amendment. Content-based regulation of speech is no more legitimate when the speech is religious than when the speech is secular." Pet. at 24-25.

This statement is inherently false in the context of this case. Bishop's speech is more than just an "intellectual perspective" on his subject. It is explicitly designed and intended to convey a message of religious truth. The very language of the First Amendment[11] creates a special category for such expressions, and imposes a duty on the state not to engage in any expression of opinion on this subject.

Even assuming, *arguendo*, that Bishop has some First Amendment right at stake, the issue then becomes how to reconcile a direct conflict between rights and duties arising from the First Amendment. The task before the court is to balance one interest, such as free speech, free press, or free exercise, against the competing interest, such as a duty to prevent an Establishment Clause violation. In this case, the interest in preventing Bishop from violating the Establishment Clause and disregarding the rights of his students must outweigh Bishop's own claimed free speech rights. *See Lundberg v. West Monoma Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989).[12] The old adage that "my free-

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[11] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[12] In *Lundberg*, school board officials, who personally supported prayer at a high school graduation ceremony, nonetheless refused to allow prayer at the ceremony because they were advised that this activity would probably violate the Establishment Clause of the First Amendment. Four students filed suit claiming their free speech rights had been violated. Faced with conflicting interpretations under the separate clauses of the First Amendment, the court applied the balancing test used by the Third Circuit to resolve this constitutional conflict:

[Continued]

dom ends where another person's freedom begins" applies here, especially when the balance to be struck pits the questionable right of a single professor to proclaim his religious beliefs against the uncontroverted rights of large numbers of students, who are under his tutelage, to be free from government interference with their own religious beliefs.[13]

C. This Case Is Not About Jeopardizing A Professor's Academic Freedom.

Bishop's petition describes in detail his efforts to have the University's instructions rescinded. Pet. at 6, 7.

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[12] [Continued]

> In those cases in which there is a true and uncontrived conflict between the free speech clause on the one hand, and the establishment clause on the other, we believe that the appropriate analysis requires weighing the competing interests protected by each constitutional provision, given the specific facts of the case, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the framers, by deciding which course of action will lead to the lesser deprivation of those rights.

Lundberg, 731 F. Supp. at 347 (quoting *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 559 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986)). The district court found that the school board's interest in preventing the establishment of religion outweighed the students' purported interests in exercising their free speech rights. In its analysis, the court considered the potentially greater effect a violation of the Establishment Clause carried, since it affected all the graduating seniors, not just the four complaining students who wished, but would not be able, to hear the prayer. *Lundberg*, 731 F. Supp. at 347.

[13] Without using the precise terms of this old adage, the court in *Lundberg* appropriately applied its meaning in addressing countervailing claims of the Free Exercise Clause versus Establishment Clause. "When the court addresses free exercise-of-religion claims, the court must always remain wary lest its accommodation for some consummates an establishment for many." *Lundberg*, 731 F. Supp. at 339-40.

What is significant is the absence of any indication of discussions between Bishop and University officials about academic freedom as such. In Bishop's discussions and correspondence with his Area Head, his Dean, and the President of the University, he simply maintained that he had the right to express his religious views during class time. He did not argue that he had the right to interject his religious beliefs because they were related to his subject matter. He admitted in the record below that he made those comments "not in the context of presenting multiple opinions," Pl.'s Admis. No. 2 (R1-28-No. 2), but in furtherance of his personal conviction that he "should share [his] view about Jesus with others when the appropriate circumstances arise." Bishop Aff. at 3 (R2-40). This does not constitute, and never has constituted, a debate between academicians over the educational value of a legitimate portion of course content. This is simply an attempt to convey personal religious beliefs to students during class time.

Bishop acknowledges correctly that this Court has "embraced the tradition of academic freedom" that has long been essential to the operation of American research universities, Pet. at 14, that "academic freedom remains a 'special concern of the First Amendment,'" and that the "essentiality of freedom in the community of American universities is almost self-evident." Pet. at 10. His conclusions about academic freedom are, however, based on the erroneous premise that such academic freedom belongs exclusively to the instructor and not to the institution, which is charged with the mission of exposing students to the marketplace of ideas.

The term "academic freedom" has many aspects. The cases referring to this freedom can be reconciled only by recognizing that the interpretation of the term varies with the context of each case. Mark G. Yudof, in his article entitled *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831 (1987) [hereinafter "Yudof"], identifies three separate meanings for the term.

1. *"Academic Freedom" In The Context Of A Professor's Personal Autonomy.*

The first meaning relates to a professor's personal autonomy in performing his duties in the university setting. Yudof concedes that the only support he finds for any personal First Amendment right of academic freedom is the general argument that what is good for the professor is good for education. *Id.* at 837-41.

> In my judgment, a persuasive constitutional argument for academic freedom as professorial autonomy has yet to emerge from the cases and scholarly works. The core difficulty is that *it is one thing for government to censor the private speech of individuals in the world at large, and quite another thing for public and private educational institutions to control the speech of those whom they pay to speak for them. . . .* In a sense, the University accomplishes its legitimate mission by hiring the profesor to speak for it, and without the ability to control his speech, the whole enterprise comes to nothing.
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> Unless an abridgement of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression.
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> The fundamental principle is that the public university can control what is spoken in the classroom, and the line-drawing does not seem rooted in a cognizable right of the professor.

Id. at 838-39 (emphasis added).

Yudof sees personal autonomy in scholarly endeavors of research and publication, rather than in teaching. *Id.* at 837-41. He explains that "most defenses of academic freedom as a right are historically rooted in the freedom to conduct and publish research, to advance knowledge and

truth." *Id.* at 841. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); and *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring). Indeed, the personal autonomy that a professor has in conducting research is, in reality, greater than he or she has as a teacher, because there are fewer properly motivated educational reasons that would justify constraints on a professor's research. When the professor steps into the classroom, however, other interests come into play. Students pay money to the university to receive instruction on a particular subject, and instructional time is limited. If a professor had a special First Amendment right to spend class time discussing at his whim such things as his religious beliefs, students would have a legitimate complaint that they were not receiving instruction for which they had paid.[14]

These other interests are not present when the professor is engaged in research, and, therefore, his research activities are not as much subject to supervision.[15]

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[14] Indeed, the Fifth Circuit has recognized that the interests of a college student include the payment of money for a particular course and that this interest is properly included when balancing the competing interests involved when a professor claims First Amendment protection for his in-class comments after the administration has instructed him to cease his comments. *See Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986).

[15] This Court's opinion in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), endorsed the principle that administrators have substantially more control over the classroom, because of their duty to control the curriculum, than they do over other facets of the school's operation. *Pico* involved the removal of books from a school library because administrators personally believed that the books were "anti-American, anti-Christian, anti-semitic, and just plain filthy." *Id.* at 857. In deciding against the administrators, this Court focused on the distinction between control over books in a library versus those required in the classroom.

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance

None of the cases cited by petitioner squarely hold that a professor, in the context of a university class, has the right to interject comments about personal beliefs unrelated to the subject matter, over the well-founded objection of administrators. There are cases that contain rhetoric about academic freedom, but as Yudof correctly observes, constitutional protection is not afforded to the unfettered discretion of a professor to express himself freely in the classroom.

2. *"Academic Freedom" As Institutional Autonomy And As Judicial Restraint.*

The second and third meanings of "academic freedom" cited by Yudof relate to the university's autonomy, which enables the university to fulfill its mission of creating an atmosphere where ideas are fully exchanged, and to the judicial policy of restraint, which is premised on the courts' recognition that it is in the best interest of education to allow administrators, rather than courts, to manage educational institutions. *See* Yudof, *supra*, at 848-54.

These twin concepts of academic freedom may be viewed as two sides of the same coin. The key point is that the judiciary recognizes that education is better served if those in the business of educating make the decisions necessary to achieve their mission. Therefore, judicial restraint is necessary to ensure institutional autonomy, and consequently the meaning of academic freedom is strengthened as it relates to the university administration.

That some form of "academic freedom" belongs to the institution itself is evident from numerous opinions of this Court. For example, Justice Stevens, writing for a unanimous Court in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), reaffirmed this Court's "re-

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upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway.

Id. at 869 (emphasis in original).

luctance to trench on the prerogatives of state and local educational institutions and [the court's] responsibility to safeguard [the institution's] academic freedom, 'a special concern of the First Amendment.'" *Id.* at 226 (quoting from *Keyishian v. Board of Regents*, 385 U.S. at 603). The concept of academic freedom is defined as one that "thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . ., but also, and somewhat inconsistently, *on autonomous decisionmaking by the academy itself. . . .*" *Ewing*, 474 U.S. at 226 n.12 (citations omitted & emphasis added). This Court has recognized its responsibility to safeguard the First Amendment's "four essential freedoms" of a university: "[T]o determine for itself on academic grounds who may teach, *what may be taught, how it shall be taught*, and who may be admitted to study." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added).[16] Bishop would have this Court hold that once a university exercises the first freedom—to determine "who may teach"—it gives up the second two freedoms—to determine "what may be taught" and "how it shall be taught."

The Court recognizes that the judiciary is not particularly well-equipped to review the substance of a "genuine academic decision." As this Court recognized in *Ewing*,

> [i]f a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and

[16] This Court has endorsed Frankfurter's articulation of the First Amendment's four freedoms of an institution in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978), and in *Ewing*, 474 U.S. at 226 n.12.

> [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking."

Id. at 226. Because of the courts' respect for the institution's professional judgment, a court will not substitute its own judgment in reviewing academic decisions unless the educational decision being reviewed departs so substantially from accepted academic norms that it is evident that professional judgment was not exercised. *Id.*

D. When Have The Courts Become Involved In Internal Educational Decisions?

If there is no absolute First Amendment protection for the personal autonomy of the professor and if there is a strong policy of deference to internal decisionmaking in academic institutions, when have the courts become involved in reviewing those internal decisions? Katheryn D. Katz, in her article, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U. C. Davis L. Rev. 857 (1983), argues that, despite the rhetoric about academic freedom flowing from cases such as *Keyishian*, *Tinker*, and *Sweezy*, the impression that academic freedom for professors is a grand aspect of the First Amendment is not really supported by the holdings in those cases. Rather, the courts have applied general First Amendment principles, and not special considerations, to professors in the university setting.

First Amendment cases arising in school settings can be divided into three categories. First are the cases protecting students' and teachers' participation in the political process, as long as the classroom is not disrupted.[17] Second are the cases focusing on the protection of an individual's freedom of association.[18] The third category

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[17] *See, e.g., Tinker*, 393 U.S. 503; *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

[18] *See, e.g., Keyishian*, 385 U.S. 589; *Sweezy*, 354 U.S. 234; *Gay Students Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984).

of cases involves various factual scenarios in which the courts, in determining whether the academic freedom of the institution should prevail, focused primarily on the motivation underlying the administrative action.[19]

Thus, the cases attach no special "magic" to the academic setting when an issue involving First Amendment rights of faculty arises. Courts look at the rights and interests involved, assess the motives and goals underlying administrators' decisions, and apply basic constitutional analyses in rendering their decisions.

II. THE BALANCING APPROACH OF THE COURT OF APPEALS IS CORRECT.

In upholding the University's instructions to Bishop and ordering summary judgment in its favor, the Eleventh Circuit used a balancing approach that examined: (1) the context in which the expressive activity occurred; (2) the unique employer-employee relationship present in an educational setting; and (3) any free speech rights of professors in the classroom. That approach is correct because it uses the same balancing approach that this Court has applied to all other public employees and is consistent with the nature of higher education.

A. The Balancing Approach Is Applicable To All Other Public Employees.

1. *The Court May Act Only If The Employee's Actions Involve Matters Of Public Concern.*

This Court articulated the following standard for reviewing cases involving the First Amendment rights of public employees:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." [citing *Keyishian v. Board of Regents*] At the same time it cannot be gainsaid that the state has interests as an employer in regulating the speech of

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[19] *See, e.g., Pico*, 457 U.S. 853; *Bakke*, 438 U.S. 265.

> its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance between the interests of the teacher*, in commenting upon matters of public concern *and the interests of the state*, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Educ., 391 U.S. at 568 (emphasis added).

This Court reiterated *Pickering's* balancing standard and further explained the extent of the courts' involvement in such cases in *Connick v. Myers*, 461 U.S. 137 (1983). If the employee's speech does not concern a public matter, judicial intervention is unwarranted. "[W]hen a public employee speaks . . . upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147.[20]

Pursuant to *Pickering* and *Connick*, therefore, the first step in any court's review of Bishop's activities must be to determine whether they address a matter of public

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[20] A recent decision by the Fifth Circuit states this proposition very clearly:

> If the nature of the speech is purely private, such as a dispute over one employee's job performance, a non-tenured school teacher enjoys no First Amendment protection as to that speech. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. Judicial inquiry then comes to an end, and the question of whether the employee's speech was a substantial or motivating factor in the decision not to rehire him need not even be reached. [citing *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986)] [footnotes omitted]

Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 799 (5th Cir. 1989).

concern. If not, the University must be granted wide latitude in dealing with its employee.

2. *Bishop's Actions Do Not Involve Matters Of Public Concern.*

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148.[21] An examination of all the facts in this case clearly shows that Bishop's activities do not address a matter of public concern, but deal only with a matter of intense personal interest to Bishop. His in-class statements and his extra class meeting were devoted to conveying his personal religious beliefs to his students. In no way can this be construed as a matter of public concern. Consequently, there is no need to apply any further balancing to the facts presented.

3. *Even If Bishop's Actions Involved Matters Of Public Concern, The University's Interests Are Overriding.*

Even if the activities of Bishop did involve matters of public concern, his interests would have to be balanced against the interests of the University. Bishop's interest here relates only to his personal right to communicate his religious beliefs.[22] The University's interests are much stronger. The University has the responsibility to formulate and administer its curriculum. It has a strong interest in ensuring that faculty members adhere to that curriculum and that they not change the content of courses

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[21] In a footnote to that statement, this Court makes it clear that "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7.

[22] As the Eleventh Circuit held, Bishop has never seriously argued that he has the right to engage in these activities under the Free Exercise Clause of the First Amendment. *Bishop*, 926 F.2d at 1077.

in ways deemed unwise or unwarranted by appropriate University officials. Also, the University has a legitimate interest in seeing to it that faculty members respect students' rights and refrain from exploiting their positions by imposing personal religious views on their students.

In light of the strong concerns of the University, which are reasonable in light of its constitutional and statutory duties, any balancing should conclude that the University's interests outweigh those of Bishop.

B. The Nature Of Higher Education Is One Of A Continual Balancing Of Competing Interests.

Decisionmaking in higher education involves a continual process of balancing competing, sometimes overlapping, interests to provide quality education for student consumers. Such interests include those of students, of faculty, and of administrators.

While the administrators must ensure that the institution offers a curriculum that is responsive to the desires of its students, meets the needs of the state supporting it, and offers quality programs acceptable in the community of higher education, they must balance all factors, including the interests of professors *and* students, in such a way as to achieve an adequate accommodation to each interest without causing serious detriment to some other interest.

The expression of personal opinions by any member of the faculty is certainly desirable in discussions about academic decisions, but one individual opinion cannot be allowed to outweigh the collective judgment of the university community. This is true even if the individual faculty member believes that his judgment as to the content of his class presentations is protected within the scope of his "academic freedom." To allow such individual overriding of collective judgments about curricular content would be to create academic anarchy.

III. THE DECISION OF THE COURT OF APPEALS TO UPHOLD THE ACTION OF THE UNIVERSITY IS CORRECT.

Petitioner's effort to have this Court perceive an infringement on academic freedom, necessitating judicial action to protect the interests of academicians everywhere, should fail. The result achieved by the Eleventh Circuit is correct because it protects students and their religious freedom in the classroom.

A. The Interests Of Students At The University Demand Upholding The Instructions Given To Petitioner.

By portraying an overbearing administration censoring his speech, Petitioner would have this Court believe that his rights are the only ones at stake. As evidenced by the complaints made, Bishop totally ignored the First Amendment rights of students in his classes, despite *Tinker*'s clear statement that students retain such rights in the classroom. *Tinker*, 393 U.S. at 506. By taking this view, Bishop refuses to recognize that, in reality, the University's action was taken to protect, rather than to restrict, rights.

To clarify the picture, Respondents suggest that it would be valuable to analyze the facts in this case from a different perspective. Assume that the University had done nothing in response to the students' complaints about Bishop's activities. Now assume that a student had sued the University, alleging that her rights had been infringed and that Bishop's activities violated the Establishment Clause. The constitutional issues would remain the same, but the student interest would be more apparent.

The protection of that interest is precisely the effect of the court of appeals' decision. Without clearly stating such, the Eleventh Circuit decided that the University could protect the interests of its students as it deemed

necessary. The result of the decision is that students are not forced to listen to Bishop's religious beliefs and are not faced with the coercive choice of whether or not to attend an extra class meeting that addresses a purely religious topic.

The memo given to Bishop was simply a reminder to separate his professional and personal activities. It was not a disciplinary action.[23] It attempted to balance his rights against those of his students and the University. It made no attempt whatsoever to address his private activities, and the court of appeals so held:

> We conclude that the University's restrictions as expressed in its memo are sufficiently narrow and clear to put Dr. Bishop on notice of what he cannot do and do not reach otherwise protected speech. We are confident that, as a professional, Dr. Bishop knows that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his students during "instructional time" or under the guise of the courses he teaches in so-called optional classes.

Bishop, 926 F.2d at 1071.

B. Adoption Of Petitioner's View Would Create A "Super" Free Speech Right For Professors.

Some consideration must be given to the consequences of adopting Petitioner's view of academic freedom. From his petition, it appears that Bishop believes that a university instructor should be totally free to speak about whatever subject he or she chooses during class time and to schedule extra class meetings on any topic, with only two minor caveats. First of all, the teacher would, arguably, have to cover the subject matter of the courses assigned. Second, he or she would have to avoid "disruption" in the classroom. According to Petitioner's view, if the instruc-

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[23] Indeed, Bishop has not been disciplined in any way and was, in fact, granted tenure during the course of this case.

tor did these two things, the administration *could not* interfere with his or her conduct in class.

This would create an intolerable situation on college campuses. Professors who were so minded could impose any number of personal views on their students for a significant amount of time in every class. They could then go through the assigned material in the remaining time and, if efficient in their teaching, arguably could say that they had done their job by covering the material. Under Petitioner's view, the administration could not act to preclude those daily harangues. Similarly, if a professor avoided inflaming his or her students to the point that classes were disrupted, whether by diplomacy or intimidation, the administration could not act. Students would then be nothing more than captive audiences subject to daily doses of the pet peeves and personal beliefs of faculty members.

Respondents realize that even if faculty members were given *carte blanche*, not all would react in this way; large numbers would continue to adhere to their professional standards.[24] It is foreseeable, however, that some unknown number would not hesitate to take advantage of their students. Surely, this is not the kind of scenario that can be tolerated under the guise of "academic freedom" for the professor. No other public employees, and

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[24] *The Statement of Professional Ethics*, adopted by the Council of the American Association of University Professors in April, 1966, reads in part:

> As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the students as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

indeed no other citizens, enjoy such protection for their expressions. Protecting the "marketplace of ideas" was never intended to place that kind of burden on the administrators or consumers of higher education.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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